(28,521)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 566.

THE ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 16, 1922.

1 Court of Claims.

No. 34064.

THE ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

vs.

THE UNITED STATES.

I. *History of Proceedings.*

On February 1, 1919, the plaintiff filed its original petition.

On March 6, 1919, the plaintiff filed an amendment to the petition.

On November 10, 1919, the defendant filed a motion to require plaintiff to make its petition more definite and certain. This motion was overruled without prejudice on December 1, 1919.

On January 12, 1920, the defendant was allowed, in open court, to file demurrer, and said demurrer to the original and amended petition was filed January 27, 1920.

On March 8, 1920, the demurrer was argued and submitted.

On March 22, 1920, the court filed an order sustaining defendant's demurrer and granting plaintiff thirty (30) days within which to amend petition.

On May 19, 1920, the plaintiff filed an amended petition. Said amended petition is as follows:

2 II. *Amended Petition and Appendices A & B.*

Filed May 19, 1920.

Amended Petition.

Petitioner by leave of court files this, its amended petiton, to take the place of its petition filed on the 1st day of February, 1919, and an amendment thereto by separate paper filed on the 28th day of February, 1919, and says:

I.

Petitioner is a corporation organized under the laws of the State of Missouri. It operates and at the times hereinafter stated, did operate a system of railways in said State and others.

Petitioner has at all times borne true allegiance to the Government of the United States and never in any way aided, abetted or gave encouragement to rebellion against said Government.

II.

During the periods hereinafter stated petitioner, under contracts with the Postoffice Department, carried the mails over mail routes established by the postal authorities, on said railway lines; such mail routes being described hereinafter by their terminal points
3 and by numbers given to them by the postal authorities. Such contracts, as to each of said routes, consisted of a statement prepared by a proper officer of petitioner, on a form furnished by the Postoffice Department, of the distances between the railway stations and a clause in the words below, printed on the same form and signed by an authorized officer of petitioner:

"The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the department applicable to railroad mail service."

It was stipulated and understood between petitioner and the Postmaster General, in the negotiating and signing of said agreements, severally, that they related to terms of four years to commence respectively on July 1st, following the signature.

III.

By acts approved March 3, 1873 (17 Stat., 558), and July 12, 1876 (19 Stat., 78), making appropriation for the expenses of the Postoffice Department, Congress fixed the rates of compensation to be paid for the transportation of the mails, and in said act of July 12, 1876, it was provided that, for transportation of the mails over land-aided railroads, there should be paid only 80 per cent of the rates so established.

IV.

Said act of March 3, 1873, contained a new and amplified plan by which to compenste the railroad companies equitably and adequately for the transportation of the mails. Following is the text of that part of said act by which the rates of compensation were designated:

"For increases of compensation for the transportation of
4 mails on railroad routes upon the condition and at the rates hereinafter mentioned, five hundred thousand dollars, or so much thereof as may be necessary. Provided, that the Postmaster General be, and he is hereby, authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned, to wit: That the mails shall be conveyed with due frequency and speed; that sufficient and suitable room, fixtures and furniture, in a car or apartment properly lighted and warmed, shall be provided for route agents to accompany and distribute the mails, and that the pay per mile per annum shall not exceed the follow-

ing rates, namely: On routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars; five hundred pounds, seventy-five dollars; one thousand pounds, one hundred dollars; one thousand five hundred pounds, one hundred and twenty-five dollars; two thousand pounds, one hundred and fifty dollars; three thousand five hundred pounds, one hundred and seventy-five dollars; five thousand pounds, two hundred dollars, and twenty-five dollars additional for every additional two thousand pounds." * * *

Said act of Congress approved July 12, 1876 (19 Stat., 79), provided that the compensation to the railroad companies for the transportation of the mails should be reduced "ten per centum per annum from the rates fixed and allowed" by said act of 1873. By similar phraseology the corresponding act of Congress approved July 17, 1878 (20 Stat., 142) made a further reduction of 5 per cent in the rates of compensation. The corresponding act of Congress approved March 2, 1907 (34 Stat., 1212), contained the following provision:

"The Postmaster General is hereby authorized and directed to readjust the compensation to be paid from and after the first day of July, nineteen hundred and seven, for the transportation of
5 mail on railroad routes carrying their whole length an average weight of mail per day of upward of five thousand pounds by making the following changes in the present rate per mile per annum for the transportation of mail on such routes, and hereafter the rates on such routes shall be as follows: On routes carrying their whole length an average weight of mail per day of more than five thousand pounds and less than forty-eight thousand pounds the rate shall be five per centum less than the present rates on all weights carried in excess of five thousand pounds, and on routes carrying their whole length an average weight of mail per day of more than forty-eight thousand pounds the rates shall be five per centum less than the present rates on all weights carried in excess of five thousand pounds, and for each additional two thousand pounds in excess of forty-eight thousand pounds at the rate of nineteen dollars and twenty-four cents upon all roads other than land-grant roads, and upon all land-grant roads the rate shall be seventeen dollars and ten cents for each two thousand pounds carried in excess of said forty-eight thousand pounds."

In putting said act of March 3, 1873, into effect the Postmaster General interpreted it as requiring that the full rates of compensation named therein be paid. In putting into effect said act of July 12, 1876, he took the view that the full rates then in effect were a fixed basis for the reduction of compensation; and in the same sense he applied said enactments of June 17, 1878, and March 2, 1907. In that way the compensation due petitioner under its said contracts was computed. Rates of compensation, so computed, were published in circulars and orders of the Postoffice Department issued at various times before July 1, 1910, and are set out in section 1317 of a revised

edition of said Postal Laws and Regulations which was promulgated October 1, 1913.

6 V.

For the purposes of said act of March 3, 1873, the Postmaster General divided the country geographically into four sections, and the mails have since been weighed, and new agreements for the transportation thereof signed, in one of said divisions each year. Some of petitioner's said routes lie in the division which the Postmaster General thus denominated the third and the others in the division denominated the fourth. The mails were weighed and said agreements signed, as to the Fourth Division lines in the months of February to June of the year 1910, and as to the Third Division routes the weighing and contracting occurred during the same period in 1911, the agreements to be effective on July 1st of each year.

VI.

The matter to be transported under said contracts was defined by the act of Congress approved March 3, 1879, making appropriation for expenses of the Postoffice Department (20 Stat., 355). That act classified the mails to the following effect: In the first, second and third classes were included letters, postal cards, other written matter, newspapers, and other periodical publications, books, circulars, other printed matter not published periodically, proof sheets and manuscript copy for printers. Fourth-class mails were defined, as below, by section 20 of said act (p. 360):

"That mailable matter of the fourth class shall embrace all matter not embraced in the first, second, or third class, which is not in its form or nature liable to destroy, deface or otherwise damage the contents of the mail bag, or harm the person of any one engaged in the postal service, and is not above the weight provided by law, which is hereby declared to be not exceeding four pounds for
7 each package thereof, except in case of single books and documents published or circulated by order of Congress, or official matter emanating from any of the departments of the Government or from the Smithsonian Institution, or which is not declared nonmailable under the provisions of section 3893 of the Revised Statutes as amended by the act of July 12, 1876, or matter pertaining to lotteries, gift concerts or fraudulent schemes or devices."

Section 3893 of the Revised Statutes relates solely to printed matter of obscene, lewd, or lascivious character.

By said act of Congress authority was given to the Postmaster General to determine what articles were of a nature to cause damage to the mails or to persons engaged in the postal service; and the Postmaster General by orders fixed upon the following articles and excluded them from the mails: Intoxicating liquors, poisons, explosive, or inflammable matter, animals, birds, insects and reptiles alive or (unless prepared packed in certain prescribed ways) dead; articles

exhaling a bad odor; pistols, medicines and toilet articles (unless packed in certain prescribed ways); poisons, fruits or vegetable matter liable to decomposition, comb honey and liquors liable to ignition by shock or jar. Said orders of the Postmaster General were carried into the Postal Laws and Regulations promulgated in 1902, becoming sections 494 to 500, inclusive, thereof.

From a time long before 1879 the laws of the United States constantly fixed the rates of postage for each class of mails and graduated the same according to the weights of the packages and without regard to the distance to be traveled.

8 VII.

By section 8 of the act approved August 24, 1912 (37 Stat., 539), making appropriation for the expenses of the Postoffice Department for the fiscal year then current, Congress, for the purpose of providing speedy and cheap transportation for farm products and manufactures and other articles not admitted theretofore to the mails, established a parcel post. Among the provisions of said section are the following (pp. 557, 558):

"That hereafter fourth-class mail matter shall embrace all other matter, including farm and factory products, not now embraced by law in either the first, second or third class, not exceeding eleven pounds in weight, nor greater in size than seventy-two inches in length and girth combined, nor in form or kind likely to injure the person of any postal employe or damage the mail equipment within a period reasonably required for transportation and delivery.

"That for the purpose of this section the United States and its several territories and possessions, excepting the Philippine Islands, shall be divided into units of area formed by the intersecting parallels of latitude and meridians of longitude, represented on appropriate postal maps or plans, and such units of area shall be the basis of eight postal zones as follows:

"The Postmaster General may readjust the compensation of star route and screen wagon contractors if it should appear that as a result of the parcel post system the weight of the mails handled by them has been materially increased. Before such readjustment, however, a detailed account must be kept as to the amount of business handled by such star route or screen wagon contractors before and after this section becomes effective for such a period as to clearly demonstrate the amount of the increase and that such increase in the weight of the mails was due to the adoption of the parcel post system."

9 Zones, numbered from 1 to 8, were designated by said act in accordance with the radial distances to be traveled from the points of mailing, and rates of postage were named which were graduated with reference to the number of zones included in the transit as well as to the weights of the mail packages.

VIII.

Under orders issued by the Postmaster General in the summer and autumn of 1912 the parcel post so provided for was inaugurated on January 1, 1913, limited to weights of eleven pounds as prescribed in said act, and during the remaining portions of said contract periods, terminating on June 30, 1914, and June 30, 1915, respectively, petitioner transported a large volume of mail packages of weights ranging up to eleven pounds and of such nature as, before the passage of such act, could not have been admitted to the mails. For some months in November and the first part of December, 1912, the Postmaster General caused the mails, as hauled by the contractors operating screen wagons at petitioner's stations, to be weighed, and, again, for several weeks in February and March, 1913, he caused the mails hauled by said contractors, including the parcel-post matter, to be weighed, and he kept detailed accounts of the results of each of said weighings. No provision for compensation to the mail-carrying railways for the parcel-post service was made until in the act of Congress approved March 4, 1913, making appropriation for the expenses of the Postoffice Department for the fiscal year ending June 30, 1914 (37 Stat., 791). That act contained (p. 797), the following provision:

"That on account of the increased weight of mails resulting from the enactment of section eight of the act of August twenty-fourth, nineteen hundred and thirteen, the Postmaster General is authorized to add to the compensation paid for transportation on railroad routes on and after July first, nineteen hundred and thirteen, for the remainder of the contract terms, not exceeding five per centum thereof per annum, excepting upon routes weighed since January first, nineteen hundred and thirteen, and to be readjusted from July first, nineteen hundred and thirteen, until otherwise provided by law."

IX.

Said limit of weight to eleven pounds per package of parcel-post matter continued in effect only until August 15, 1913. By an order effective on said latter day the Postmaster General, having first obtained the consent of the Interstate Commerce Commission, made various changes in the rates of postage and other conditions of the service and raised the weight limit to twenty pounds. Again, by an order effective January 1, 1914, the Postmaster General, having obtained the consent of the Interstate Commerce Commission, made changes in the details of the service and, for transportation in one zone or two zones, raised the weight limit to fifty pounds per package. Under said new designations of weight, and in accordance generally, with said orders of the Postmaster General, the parcel-post matter was transported by petitioner to the ends of its said contract periods. The first of said orders bore date of July 25, 1913, being numbered 7349, and the other order bore date of December 18,

1913, being numbered 7720. In relation to said increases of weight the act of Congress approved July 28, 1916, making appropriation for the expense of the Postoffice Department for the fiscal year then current (39 Stat., 412), contained two sections, as follows (p. 425):

Sec. 3. That on account of the increased weight of mails resulting from the Postmaster General's order numbered seventy-seven
11 hundred and twenty, of December eighteenth, ninete-n hundred and thirteen, respecting rates upon and limit of weight of parcel post packages, effective from January first, nineteen hundred and fourteen, the Postmaster General is authorized to add to the compensation paid for transportation on railroad routes on and after January first, nineteen hundred and fourteen, for the remainder of the contract terms, not exceeding one per centum thereof per annum.

Sec. 4. That on account of the increased weight of mails resulting from the Postmaster General's order numbered seventy-three hundred and forty-nine, of July twenty-fifth, nineteen hundred and thirteen, respecting rates upon and limit of weight of parcel post packages in the local, first and second zones, and effective from August fifteenth, nineteen hundred and thirteen, the Postmaster General is authorized to add to the compensation paid for transportation on railroad routes on and after August fifteenth, nineteen hundred and thirteen, for the remainder of the contract terms, not exceeding one-half of one per centum thereof per annum.

X.

Neither when putting into effect said act of March 4, 1913, nor at any other time did the Postmaster General ascertain the weights of the parcel-post matter in relation to the railway routes. He merely, through examination and reports made by his subordinates, estimated, in proportion to the mails carried just before January 1, 1913, the weight of the parcel-post matter carried on each of said routes. In allowing compensation to the railway companies for the parcel-post service he interpreted said act as limiting him to 5 per cent of the previous compensation and giving him discretion to allow for the service on any route any increase within that limit
12 or no increase whatever. Action was taken by him, regarding the postal routes concerned herein, as follows:

For certain routes increases of 5 per cent were designated and allowed, which aggregated the sum of $4,111.98.

For others of said routes, increases ranging from 1.6 per cent to 4 per cent were designated and allowed, which aggregated the sum of $902.81.

For others of said routes no increases whatever were allowed.

In appendices hereto there are stated (*a*) the increases so allowed and paid, and (*b*), in relation to the routes for which no increases were paid, the annual compensation of those routes severally at that time for transportation of the ordinary mails.

XI.

In putting into effect said act of July 28, 1916, the Postmaster General allowed to the greater part of said routes, hereinafter described, the full rates of increase named therein, viz., (*a*) one-half of 1 per cent and (*b*) 1 per cent, above the compensation allowed and paid at said times when said changes in the weight limit were made, which full allowances aggregated the sum of $552.61.

To others of said routes he allowed no increases whatever.

In appendices hereto there are stated (*a*) the increases so allowed and paid and (*b*), in relation to the routes for which no increases were paid, the annual compensation of those routes at the time stated as computed by the Postmaster General.

13 ## XII.

The parcel-post matter was radically different in character from the ordinary mails as constituted before January 1, 1913. It was lighter, in proportion to space occupied, and was less regular in shape and more difficult to handle; and the parcel-post matter admitted by the increase of the weight limit above eleven pounds was lighter, in proportion to space, and less regular in shape than that carried before said increase. The parcel-post matter therefore, both before and after August, 1915, was more expensive to transport than were the respective previous mails of equal weight.

XIII.

The compensation fixed for the transportation of the ordinary mails from January 1 to June 30th, inclusive, in 1913 (the period for which no compensation was received with respect to the parcel-post service on any of its routes), was $50,314.40.

XIV.

Said increases of compensation were far less than was necessary to compensate petitioner for said parcel-post service. The least rates of increase which would have afforded such reasonable compensation were (*a*) 15 per cent per annum with respect to the packages of eleven pounds weight and less, and (*b*), for the entire portions remaining, after August 15, 1913, of said contract periods, 6 per cent of the compensation for the transportation, during the same time, respectively, of the mails as constituted on August 14, 1913. In detail it says its compensation for the parcel-post service should have been:

14 (1) For the six months January 1, to June 30, 1913, 15 per cent of the compensation fixed for transportation of the ordinary mails during that time, to wit, the sum of $7,547.16.

(2) For routes to which the full 5 per cent was allowed with respect to the original parcel-post matter the difference (10 per cent) between (*a*) 15 per cent and (*b*) 5 per cent of the compensation fixed for the transportation of the ordinary mails during the same time, to wit, the sum of $8,223.96.

(3) For routes to which increases of less than 5 per cent were paid with respect to the original parcel-post matter the difference (11.637 per cent) between (*a*) 15 per cent of the compensation fixed for the transportation of the ordinary mails during the same time and (*b*) the aggregate of the amounts it so received, to wit, the sum of $3,124.

(4) For routes to which nothing was allowed with respect to the parcel-post service limited to eleven pounds weight 15 per cent of the compensation fixed for the transportation of the ordinary mails the same time, to wit, the sum of $156.14.

(5) For routes to which said full statutory allowances of one-half of 1 per cent and 1 per cent were made by the Postmaster General the difference between (*a*) 6 per cent of the compensation fixed for transportation, during the same time, of the mails as constituted on August 14, 1913, and said aggregate sum allowed by him, which difference is $3,900.56.

(6) For routes to which the Postmaster General allowed nothing with respect to increases of weight above eleven pounds per package, 6 per cent per annum of the compensation fixed for transportation, during the same time, of the mails as constituted on August 14, 1913, to wit, the sum of $895.07.

15 XV.

When said provision was made for the parcel post, and when the same was inaugurated, the railroad companies, including petitioner, the chief officers of the Postoffice Department and the members of Congress in both houses having charge of postal legislation understood that compensation to the railroad companies therefor would be provided by Congress. The Postmaster General, in his report for 1912, suggested that action should be taken promptly by Congress to provide for the railroad companies the additional compensation to which they would be entitled. There was then sitting a body, established by previous legislation of Congress, popularly known as the "Bourne Commission," charged to investigate the entire subject of the railway mail pay. The principal railroads of the country, including claimant, were represented by a Committee on Railway Mail Pay. Said committee in December, 1912, in letters to the chairman of the House Committee on Postoffices and Post Roads and to the chairman of said commission, pointed out that no satisfactory determination of the compensation due for the parcel-post service could be reached before the service should be established and suggested that in an appropriation bill then in course of preparation

provision should be made for annual weighings of the mail to obtain bases for compensation of the railroad companies; but no such change in the weighing system was made by Congress in said bill nor in any legislation thereafter. After the Postmaster General had announced the increases to be paid to the railroad companies with respect to the parcel-post matter limited to eleven pounds, to wit, in August, 1913, said Committee on Railway Mail Pay submitted to the Postmaster General a protest in writing against both (1) the denial of all compensation to the railroad companies for the
16 parcel-post service previous to July 1st just past and (2) the amounts proposed to be paid for the service commencing on that day; and in other ways, during said contract terms, petitioner made protests to the Postoffice Department on both of said points.

XVI.

Much of the larger part of the mails on petitioner's routes and on the routes of the other important railroad companies were carried in postoffice cars, for which cars arrangements were made between the Postoffice Department and the railroad companies independent of the contracts for mail transportation, and, under such arrangements, such cars were in operation on petitioner's said routes at the time when the parcel post was established and at the times when the increases in weight of the parcel-post matter became effective. The greater part of the mails carried in such cars were loaded into and out of the same by contractors or other persons employed by the Postoffice Department, over whom petitioner and the other railroad companies had no control, and the Postal Laws and Regulations (sec. 1583), forbade that railroad employes should enter the postoffice cars when in motion for any other purpose than the operation of the trains. Moreover the parcel-post matter was so confused with the other mails that the employees of petitioner and the other railroad companies could not possibly have distinguished them, and removed them from the postoffice cars, if otherwise they had had opportunity.

Petitioner prays judgment against the United States for the total of said sums set out in paragraph XIV hereinbefore, viz., $23,846.89.

THE ST. LOUIS SOUTHWESTERN
RAILWAY COMPANY,
By BENJ. CARTER,
Its Attorney in Fact.

17 DISTRICT OF COLUMBIA, *ss:*

Before me, Jesse L. Conwell, a Notary Public in and for said District, Benj. Carter, whose name is written as a part of the signature of the foregoing petition, made oath on this 19th day of May, 1920, that the allegations of said petition are true to the best of his knowledge, information and belief.

BENJ. CARTER.

Subscribed and sworn to before me the day above written.
JESSE L. CONWELL,
Notary Public.

18

APPENDIX A.

Allowances, or Bases Therefor, under Act of March 4, 1913.

Five per Cent Allowances.

Fourth Division Routes to June 30, 1914.

Route No. and termini.	Allowances.
147,042—Cairo, Ill.-Texarkana, Ark.	$3,842.62
149,019—Lewisville, Ark.-Shreveport, La.	269.36
Total	$4,111.98

Allowances Less Than Five per Cent.

Third Division Routes.

Route No. and termini.	Annual compensation.	Annual per cent.	Allowance, amount.
145,051—North Jct., Ill.-Malden, Mo.	$9,174.35	3.87	$355.04
145,052—Lilbourn-New Madrid, Mo.	260.77	1.98	5.16
Total for 1 year	$9,435.12		$360.20
Total for 2 years	$18,870.24		$720.40

Fourth Division Routes.

147—Argenta-Altheimer, Ark.	$3,266.93	2.32	$73.26
147,030—Stuttgart-Gillett, Ark.	1,867.01	1.60	29.93
147,038—Stuttgart-England, Ark.	1,152.75	4.00	46.11
147,039—Blytheville-Paragould, Ark.	1,680.78	1.97	33.11
Totals for 4th Div.	$7,967.47		$182.41
19 Totals for 3rd Div.	$18,870.24		720.40
Totals for two Div.	$26,837.71		$902.81

Average per cent allowed 3.363+

Annual Compensation (1912) in Case of no Allowance.

Route No. and termini.	Annual compensation.
147,020—Robroy-Waldstein, Ark.....	$1,040.96

APPENDIX B.

Allowances, or Bases Therefor, under Act of July 28, 1916.

Allowances at Full One-half and One Per Cent.

Route No.	Annual compensation.	Aug. 15, 1913, to June 30, 1914.
147,026	$3,266.93	$30.44
147,030	1,867.01	17.90
147,038	1,152.75	11.29
147,039	1,680.78	16.15
147,042	76,852.45	476.73
	$84,819.92	$552.51

Annual Compensation (1912) in Cases of no Allowances.

Route No.	Annual compensation.	
145,051	$9,174.35	
145,052	260.77	
Total for 3rd Div. Routes.....		$9,435.12
149,019 4th Div.....		5,389.02
Total for two division-.....		$14,824.14

20 III. *Demurrer to the Amended Petition.*

Filed June 21, 1920.

The United States, by the Attorney General, demurrers to the amended petition filed herein, May 19, 1920, and for cause of demurrer says that the amended petition does not state facts sufficient in law to constitute a cause of action.

FRANK DAVIS, JR.,
Assistant Attorney General.

J. ROBERT ANDERSON,
Special Assistant to the Attorney General.

IV. *Argument and Submission of Demurrer.*

On January 17, 1921, the demurrer to the amended petition was argued and submitted by J. Robert Anderson, Esq., for the defendant, and by Benjamin Carter, Esq., for the plaintiff.

21 ## V. *Order and Memorandum Entered by the Court February 7, 1921.*

Order.

This case coming on to be heard was submitted upon the demurrer of the defendant to the plaintiff's petition and the argument of counsel thereon. On consideration whereof the court is of opinion that the demurrer of the defendant is well taken. It is therefore adjudged and ordered by the court that the said demurrer be and it is sustained, and the plaintiff's petition is dismissed.

Memorandum.

The claim of the plaintiff is not founded upon a contract, express or implied, nor has any act of Congress authorized the payment of the additional amount demanded by the plaintiff.

Congress authorized an increase in the compensation of the carriers not exceeding five per centum on account of parcel post, and this fact negatives the idea that Congress meant or understood that an implied contract was created by the parcel-post act.

It appears from the allegations of the petition that plaintiff voluntarily accepted and performed the service with knowledge of what it would receive, and it can not now claim an implied contract for a greater sum.

See New York, New Haven & Hartford R. R. Co. Case, 251 U. S., 123, 127 (53 C. Cls., 227, 236); Delaware, Lackawanna & Western R. R. Co. Case, 249 U. S., 385; Atchison, Topeka & Santa Fe Ry. Co. Case, 249 U. S., 451; The "Mail Divisor" Cases, 251 U. S., 326, 328, 339 (53 C. Cls. 258).

22 ## VI. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Seventh day of February, A. D., 1921, judgment was ordered to be entered as follows:

This case coming on to be heard was submitted upon the demurrer of the defendant to the plaintiff's petition and the argument of counsel thereon. On consideration whereof the court is of opinion that the demurrer of the defendant is well taken. It is therefore adjudged and ordered by the court that the said demurrer be and it is sustained, and the plaintiff's petition is dismissed.

By THE COURT.

VII. *Plaintiff's Application for and Allowance of an Appeal.*

Claimant shows to the court that the amount claimed by the petition in this case is more than three thousand dollars ($3,000.00); that a demurrer was filed to the petition, after amendment of the averments thereof, and, said demurrer having been heard by the court, a judgment was rendered on the 7th day of February 1921 sustaining the demurrer and dismissing the petition. Claimant applied hereby for an appeal from said judgment to the Supreme Court of the United States.

BENJ. CARTER,
Attorney for Claimant.

Filed May 4, 1921.

Ordered: That the above appeal be allowed as prayed for.
May 23, 1921.

By THE COURT.

23 Court of Claims.

No. 34064.

THE ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

vs.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of demurrer; of the order and memorandum filed by the court; of the judgment of the court; of the plaintiff's application for and allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Eighth day of June, A. D., 1921.

[Seal of the Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 28,521. Court of Claims. Term No. 566. The St. Louis Southwestern Railway Company, appellant, vs. The United States. Filed October 4th, 1921. File No. 28,521.

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IN THE

Supreme Court of the United States.

October Term, 1922.

No. 184.

THE ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Appellant,

v.

THE UNITED STATES, *Appellee.*

BRIEF FOR APPELLANT.

Appellant, the St. Louis Southwestern Railway Company, contracted to carry the mails for periods of four years, unless sooner terminated by orders of the Postmaster General, commencing on July 1, 1910, as to four mail routes and on July 1, 1911, as to two other routes. Midway of these contract terms, Congress established the parcel post, the operation of which commenced on January 1, 1913. No compensation was ever voted by Congress, and none received by the railroad companies for the initial six months of this service, terminating on June 30, 1913. For later periods, running to the end of the quadrennial terms, by the Postoffice Appropriation Acts of March 4, 1913, and July 28, 1916, the Postmaster General was authorized to pay specific compensation,

within maxima named, for the parcel post service to the end of the quadrennial terms. To the present appellant, as to the railroad companies generally, there was paid much less than the full increases authorized.

The suit seeks to recover reasonable compensation for the six months period indicated and additional compensation, to make up reasonable and compensatory totals, not limited by the rates which Congress authorized, for the remaining one year and two years respectively of the contract periods.

The facts will be clearer if the statement commences with the Act of Congress of March 3, 1879 (20 Stat., Ch. 359, p. 355) which defined and classified the mails. In the first, second and third class were included letters, postal cards, other written matter, newspapers and other periodicals, books, circulars and printed matter generally. Fourth-class mails were defined, by section 20 of said act, as below:

> "That mailable matter of the fourth class shall embrace all matter not embraced in the first, second, or third class, which is not in its form or nature liable to destroy, deface or otherwise damage the contents of the mail bag, or harm the person of any one engaged in the postal service, and is not above the weight provided by law, which is hereby declared to be not exceeding four pounds for each package thereof, except in case of single books and documents published or circulated by order of Congress, or official matter emanating from any of the departments of the Government or from the Smithsonian Institution, or which is not obscene matter declared non-mailable under the provisions of section 3893 of the Revised Statutes as amended by the act of July 12, 1876, or matter pertaining to lotteries, gift concerts or fraudulent schemes or devices."

By this act authority was given to the Postmaster General to determine what articles were of a nature to cause damage to the mails or to persons engaged in the postal service; and the Postmaster General by orders fixed upon the following articles and excluded them from the mails: Intoxicating liquors, poisons, explosive, or inflammable matter, animals, birds, insects, and reptiles alive or (unless prepared packed in certain prescribed ways) dead; articles exhaling a bad odor; pistols, medicines and toilet articles (unless packed in certain prescribed ways); poisons, fruits or vegetable matter liable to decomposition, comb honey and liquors liable to ignition by shock or jar. These orders of the Postmaster General were carried into the Postal Laws and Regulations promulgated in 1902, becoming sections 494 to 500, inclusive, thereof.

Both before and after 1879 the laws constantly fixed the rates of postage for each class of mails and graduated the same according to the weights of the packages and without regard to the distance to be traveled.

This act was always understood by the public as providing for transportation for a package, weighing four pounds or less, of drygoods or hardware or other dry merchandise, or articles of domestic make, but not of the larger merchandise for which the great stores in the cities were seeking and finding a larger and larger market in rural districts; and clearly it left the farmer dependent on the freight or express service of the railroads for the marketing of his products. By 1912 a strong sentiment, cultivated by the department stores, farmers and householders generally, over the systematic opposition of the express companies, had grown up in favor, especially, of the dispatch by the postal facilities of farm products and merchandise without regard to kinds or qualities, and in such ways as to compete effectively with the express companies.

During the second session of the Forty-eighth Congress the House Committee on Postoffices and Post roads gave careful study to this desired postal-freight service and, as well, to another plan, also having many friends, of merely raising the weight limit on fourth-class mail matter and, by establishing a per-pound instead of per-ounce rate, of making the service generally cheaper.

The committee in its report and the chairman, Representative John A. Moon, in his explanation thereof, confessed the difficulties with which the committee had labored and its unwillingness to provide for a postal-freight service on such information as was then accessible. The report, in part, said (Congressional Record, Vol. 48, p. 4493):

> "The most of people living in the country and engaged in agriculture and other pursuits, so far as we can secure information, and the larger mercantile establishments in the great cities favor an unlimited parcel post law. The country merchant and nearly all merchants of the smaller cities and towns oppose the law. This seems to be the alignment. Self-interest, the mainspring of most of our actions, seems to be commanding in both factions. We do not think that the advantage claimed for the establishment of this post will be so great as its ultra friends claim, nor that the disadvantages would be nearly so great as its enemies fear.
>
> "The necessity for conservative legislation in view of such a contention and division among the people is apparent. We should seek to secure all the advantages possible and avoid all the disadvantages that may arise from any proposed legislation in the interest of the masses of the whole people. Laws should bear as nearly as possible, equally and justly on all classes under all conditions. We have heard much testimony, very interesting in its details, but for the most part from those who express an opinion

from a general view of general conditions. We need specific facts and not merely opinions on which to pass intelligent and satisfactory legislation. It would seem essential that we know how this innovation in our postal system will affect our revenue; what additional burdens we must assume in increased numbers of employees and the increased railway and carriage pay; whether a flat rate can be established for the whole of the United States or not, and at what figure; whether it would be wise to adopt the zone system of transportation and pay for carriage or not; how far this extra service would interfere with the handling of first, second and third class mail matter; the probable losses and profits under different rates; the effect on the centralization of trade; whether the express companies could under one system or another secure the short hauls and leave the long and expensive hauls to the Government; whether it would first be best to condemn the express companies' contracts with the railroads or not, and use them, or to force the railroad companies to equal rates for the Post Office Department that is granted the express companies, or to pursue either of these courses; to know the tendency of the system to create and sustain monopolies and its effect on the commercial and farming interests of the country."

Considerable debate on the committee's project followed in which various members expressed objections on the points that no new facility was offered to the farmer to ship, and the consumer to receive, farm produce; that on star routes the limit of four pounds for the old fourth-class matter was not raised; that no dimensions were specified for the new matter, of the old descriptions, to weigh as much as eleven pounds per package, etc. (Ib. pp. 4494-4497). The bill passed the House, however, with no change in this provision of the committee relative to fourth-class mails.

The Senate committee on Postoffices and Post Roads practically rewrote this provision of the House bill. Here also the chairman of the committee, in submitting the report, explained the differences of views which had obtained. He stated that the Senate substitute was for the benefit of farmers, merchants and manufacturers at large, providing for the carriage, and fixing details as to large packages—establishing, in effect, an express business against which in many cases the express companies could not successfully compete; that a scientific graduation of rates, referring to distance traveled, had been worked out, etc. Among those who had been heard by the committee, and who favored the committee's scheme, he said, were the leading organizations of farmers, manufacturers, wholesale and retail merchants, commercial travelers and numerous civic bodies (Ib., pp. 10806, 10812, 10831). A few senators thought the same ends might better be served by the Government's taking over the entire express business as done by the private companies, but the bill passed the Senate practically as it came out of committee (Ib., pp. 9448-9465, 10714-10716).

Following conferences both houses consented to the insertion of the words "including farm and factory products" after "all other matter," in the second line of the Senate substitute, and so the law, as passed, contained precisely what is set out in paragraph VII of the petition (Record, p. 5).

Speaking first of the House provision the Senate report (No. 955 of that session) said:

"This is commonly referred to as a parcel post provision, but the service proposed is so limited in extent that it is not deemed satisfactory by the Senate committee. * * * The Senate committee believes that this [House] rate on fourth-class matter is excessively high,

that a flat rate is unscientific and inequitable, and that no good reason exists for further delay in the enactment of a parcel post bill. For eleven months this committee, by subcommittee and otherwise, has been giving thorough consideration to the parcel post problem and has held hearings and collected the most complete information ever made available in this country."

With aid given by a subcommittee of his committee, he being chairman thereof, and of some chief officials of the Postoffice Department, the Chairman of the Senate committee, Senator Bourne, had prepared a bill of his own, and it was this, with some unimportant changes, the committee proposed and both houses accepted as a substitute for the House provision.

In the Senate subcommittee report, adopted by the committee, or in the committee report proper it was said:

"Postal transportation in my opinion differs in some respects from any other. There are two activities in most postal service—one performed by the Government or carrier, each paid directly by the Government, and the other performed by a transportation committee. The first activity I term the overhead or handling activity, representing the collection and delivery of packages. The other I term the transportation activity, paid by the Government, not directly to the Government employee, but to the transportation company carrying the packages. * * * In the local city and rural service all the work is performed by the Government employee, whatever transportation is performed is by the Government vehicle or Government employee. Therefore the handling or overhead cost covers the transportation cost in these two activities. Therefore, as shown in section 4 of my bill, I recommend the adoption of 5 cents for the first pound and 1 cent for every additional pound up to 11 pounds on all rural routes and on all city delivery (pp. 10 and 11).

The next problem was the ascertainment of the necessary transportation charge based on distance traveled. In my initial study of the problem I thought this would be easily solved by taking each postoffice as a center and drawing around it according to the zone distance established. I soon determined the impracticability of the adoption of this plan.

The next thought was the adoption of a unit consisting of a quadrangle formed by meridians of longitude and parallels of latitude. * * * Inequality is avoided in the plan I have proposed * * * by dividing the degree-quadrangles into quadrangles of 30 minutes length north and south and east and west, giving the same rate to every postoffice in each quarter-degree quadrangle with the privilege of sending at the same rate to any postoffice in every contiguous quarter-degree quadrangle (p. 11).

I have adopted in the bill herewith presented for the first zone the rate of 6 cents for the first pound and 2 cents for each pound, 1 cent per pound being for transportation and remainder for overhead or handling charge (p. 12).

I believe the flat-rate system inequitable and impracticable as applied to packages such as we expect to transport under parcel post. It is inequitable because it disregards distance. In the transportation of letters, where the individual pieces are small, distance is of little consequence; but this is not true of packages of merchandise (p. 13).

Government ownership of express companies I deem unwise and unnecessary. It tends toward paternalism and bureaucracy. It should only be adopted as a denier resort, where regulation has been demonstrated to be a failure (p. 13).

The proposed rates, although not as low as proposed in the original bill, are in nearly all cases lower than prevailing express rates and especially low for the small sized packages. * * * Although the rates proposed in the Senate committee's substitute are on some weights and zones somewhat higher than the express rates pro-

posed by the Interstate Commerce Commission [but not established] it should be remembered that the service rendered by the postal system is much more extensive than the service rendered by the express companies. For instance the charge made by an express company for a 200-mile haul covers the transportation of a package only from one town to another, without any rural service and with a limited city delivery. On the other hand the Government, under this proposed parcel-post system, will take a parcel from a farmer's home on a rural route, carry it to town, transport it 200 miles over rail routes, and then, if desired, deliver it to another farmer out on another route. (Report proper, p. 16.)"

If explanation be necessary, this official history of the statute concerned will explain why the parcel-post matter, not merely was a great addition in tonnage to the mails, but put a much greater expense, in proportion to weight, on appellant than did the "mails," strictly speaking, which it was carrying under its contracts (Petition paragraph XII, Record, p. 12). Congress after full consideration, embarked upon that "innovation" to which Chairman Moon and the House committee adverted, which was truly a fast freight service. There would have been no innovation in character of service rendered if the House committee's plan had been adopted and the four pounds limit for dry packages (fourth-class mail) raised to eleven pounds—though apparently the railroads even in that case could have maintained their actions for breach of their contracts and recovered a proportionate increase of pay.

Propositions of Law.

(1) Under a contract for a particular service though undefined in volume, with a stipulation for increases of the same, at the option of the recipient thereof, the other

party is not lawfully bound to perform other services, differing substantially from those.

United States v. Utah Stage Co., 199 U. S. 414, 39 Ct. Cls. 438.
Weigel's case 47 Ct. Cls. 458.
Woolverton's case, 34 Ct. Cls. 247.
Union Transfer Co., case, 36 Ct. Cls. 216.
William S. Knox, Extr.'s case, 30 U. S. 59.
Freund v. United States, — U. S., not officially reported.

(2) Regardless of the abstract meaning of the words used, a contract must be interpreted and enforced in the sense that the parties intended.

Serrales Succession v. Esbi, 200 U. S. 1931.
United States v. Utah Stage Co., sup.
Rock Island Railway Co. v. Rio Grande Co., 143 U. S. 596 (609).
Kerr vs. Schwaner, 179 Fed. 659 (655, 656).

(3) When property of a citizen is taken or his service exacted either by an executive officer of the Government or by Congress, the Fifth Amendment to the Constitution requires that the Government compensate him the full amount of his injury.

Bothwell v. United States, 254 U. S. 231.
U. S. v. Cress, 243 U. S. 316.
United States v. Great Falls Mfg. Co., 112 U. S. 645, 124 U. S. 581.
United States v. Berdan Fire Arms Company, 156 U. S., 552.
United States v. Harvey Steel Co., 196 U. S., 310.
United States v. Palmer, 128 U. S., 262.

Assignment of Errors.

Appellant hereby assigns as error, committed by the Court of Claims:

(1) That the demurrer to the amended petition was not overruled.

(2) That the amended petition was dismissed.

ARGUMENT.

There has been much controversy in the Court of Claims and in this court in recent years over postal questions; but the parcel post pay, in the aspects here presented, is a new subject to the courts.

It is convenient to state summarily the matters on which this court *has* ruled.

(1) The cases of the *Northern Pacific* and three other railroads decided January 12, 1920, 251 U. S. 326, in the matter of the mail divisor. Here four of the eight justices say the seven-days divisor was prescribed by the law, while four (including two who dissent flatly) say it was not; while two justices say that by performing services after the Postmaster General had promulgated the new divisor the carriers accepted that as the rule of their compensation, and six justices seem to take the view that the carriers did *not* bind themselves to that rule. Thus the result of that hard fought controversy is that six justices concurred in refusing to overturn the decision of the Court of Claims, but that there was no majority expression on any of the capital questions involved.

Mr. Justice Pitney, when saying in that case for himself and one other member of the court, that "the claimants in fact [1907] accepted the Postmaster General's offers as contained in the readjustment notices by proceeding to perform the prescribed services in accordance therewith," obviously was not thinking of any parcel-post mat-

ter. The Postmaster General's orders did not relate to any such thing as that, and no such thing was included in the "prescribed service," for the parcel post did not exist until one-year-and-a-half to three-years-and-a-half after the contract services of the claimants in those cases commenced.

Even in relation to the mails as they existed before January 1, 1913, the decisions of this court make it clear enough that the Government could not force any arbitrary requirement on a carrier nor acquit itself by paying a non-compensatory rate for the service. (See opinion of Justices Pitney and McKenna, *supra*, p. 342.)

(2) *Delaware, Lackwanna & Western Railroad Co. v. United States, 249 U. S., 385.* This decides no more than that carriage of the mails is matter of contract and that the claimant company was not shown to have had a contract for an invariable term, so as to forbid the immediate application of the five per cent reduction, in the pay for mail transportation, provided by the act of March 2, 1907.

(3) *Atchison, Topeka & Santa Fe Co. v. United States, 225 U. S., 640.* The effect of this is that the Postmaster General had discretion to prescribe the car space to be furnished for "working" the mails *en route* and that the railroad company was bound to abide the orders made by him in that regard if it continued to perform the service, though under protest. The sole subject of the suit was the furnishing and operating of a railway postoffice; it had no relation to transportation of mails of any kind.

There has been before this court, viz., in *United States v. Atchison, Topeka & Santa Fe Railway Co.*, 249 U. S., 451, appealed from the Court of Claims, the question of the parcel-post allowances to be made by the Postmaster General to railroad companies under the phrase in the act

of March 3, 1913, "not exceeding five per cent." The appellant contended that by the practice of the department in applying like phrases in acts of 1873, 1876, 1878 and 1917, and especially in the conditions of the act of 1913, the full five per cent was payable in all cases; but this court decided differently. That suit did not attack the five per cent rate of increase as non-compensatory.

In *New York, New Haven & Hartford Railroad Co. v. United States*, 251 U. S., 123, also appealed from the Court of Claims, it was decided that the obligation of the railroad company under section 4002 of the Revised Statutes to carry the mails for the prices (salaries) established at the outset was not affected by any increase, small or great, during the contract term in the matter to be carried, and that the company was concluded by its acceptance of the mails upon that understanding of the contract. No issue was made there on the parcel-post matter put on the railroad company midway of its contract—no attempt to show (1) that this new matter was generically different from the antecedent mails or (2) that it was not in the minds of the parties when they contracted.

So, in the instant case this court is to decide for the first time (1) whether the Government lawfully could have the parcel-post matter transported for the six months January-June, 1913, free of charge, or, in other words, at the entire expense of the railroad companies, and (2) whether for the remaining one, two or three years of their contracts the Government was bound to pay the railroad companies increases at rates which would truly compensate them, or, at the least, the full five per cent and one per cent and one-and-one-half per cent authorized by Congress?

Doubtless it will be admitted that these questions turn upon the provisions of the contracts signed by appellant in 1910 and 1911.

The undertaking, signed by appellant, printed upon the Postoffice Department's Distance Circulars, was in the following language (Rec., p. 2):

> "The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the department applicable to railroad mail service."

The regulations provided for abolition of the mail route and cancellation of the contract, or curtailment of the route with proportionate deduction of compensation, by the Postmaster General at his discretion. There was nothing in the regulations authorizing any Government officer to add to or subtract from the subject matter of the contract, viz., the mails as defined by the act of March 3, 1879. Obviously that was not a subject for "regulations."

There is not a shadow of a reason for saying that appellant had contracted at any time, or in any way, to transport, with the mails, those great loads of farm products, merchandise, etc., of which the parcel-post matter was composed, weighing anything, at different stages, up to eleven, twenty or fifty pounds and any package measuring near to six feet in length. It never agreed to transport anything, outside of first, second and third class mails, but packages of dry merchandise or other matters weighing four pounds or less—fourth-class mails, in other words.

Full Compensation Due for the Service of January-June, 1913.

It is charged in the petition (Record, p. 8) that the least rates of pay which would have compensated appellant for carrying the packages of eleven pounds weight or less

were 15 per cent of the amounts due and paid during those six months with respect to the ordinary mails; wherefore the *ad damnum* is put at that figure. Of course if this be not the right measure of the recovery, appellant, on proof, would be entitled to a judgment for the value of the services performed, counted by the proper measure.

While it may be difficult, it cannot be assumed to be impossible, to establish by proofs what rates would have compensated appellant for the parcel-post service. If this proves to be impossible, then the principle of extra work will apply. On that principle, if something, outside the bounds of appellant's contracts, was added to its burdens and the cost and value of the added service were not shown by any proofs, those would be assumed to be the same as attached to the ordinary burdens, viz.: the old, contract mails, *provided* only the new service was not less expensive to appellant than was the old service in proportion to quantities. Appellant in the petition has not undertaken to say precisely what the relation, in expense, was between the parcel post and the old service; but it has alleged that the former was more "not less" costly than the latter. No more than this would seem to be necessary. In this state of fact the rates per pound which claimant was receiving on December 31, 1912, for the mail service as it then stood were applicable to the tonnage added by the parcel post; and then, with respect to this first six-months service, appellant should have judgment for the amount stated in sub-paragraph 1 of paragraph XIV of the amended petition, viz: $7,547.16 (Record, p. 8).

There has been no occasion for this court, nor apparently for any other, to decide what the words "mail service," in the quadrennial contracts of the railroad companies, mean. This is not surprising because the act of

1879 had made it all but impossible that any rational person could doubt whether an article was within the list of any of the four classes of mail established. The most arbitrary officer who ever served in the Postoffice Department could hardly have thought of demanding that a railroad company carry in its mail car, as mails, a machine weighing more than four pounds, or a shot-gun or a basket of fruit or vegetables. Nor had Congress given rise to any controversies or discussions regarding the composition of the several classes of mails. Changes had been made in the law with respect to rates per pound, the estimating of the average weights for contracting purposes, etc., but all those assumed that the mails would still contain those things which were named in the act of 1879, with some amendments thereto, and none other. The quadrennial contracts, while reserving to the Postmaster General a somewhat broad field of discretion, contained no saving in the matter of the composition of the mails; and the Postoffice Department and Congress alike recognized that a change in that regard would not be lawful unless authorized expressly by Congress. Whether an actual increase by Congress would be lawful depended, with respect to contracts already in force, on the compensating of the contractor for any additional burdens put on him—for the taking of his property, in other words. The change actually was made in such a way as to impose a heavy burden on all of the railroad companies, with no compensation whatever for a period of six months and *pro tanto* to confiscate their property for additional periods of from one to three years by paying less than the cost of the new service.

A number of screen-wagon contractors' cases, decided by this court or the Court of Claims, are closely akin in principles to the instant case. One of the most note-

worthy of these is the Utah Stage Company's case, heard, and with the same result, in both courts; 39 Ct. Cls. 420; 199 U. S., 414. This court in its opinion said:

"There must be some limit to the service which can be required without additional compensation, under the authority vested in the Postmaster General by the contract, to call for new or additional service of the same character. Otherwise it is within the power of the Government to ruin a contractor by new and wholly unanticipated demands, which caution and prudence, however great, could not have foreseen. If this were a contract between individuals a claim of the right to require this vast amount of additional work—evidently not within the contemplation of the parties—without additional compensation, would hardly be seriously entertained. The same principles of right and justice which prevail between individuals should control in the construction and carrying out of contracts between the Government and individuals."

Chief Justice Nott, delivering the opinion of the Court of Claims in that case, said:

"In previous cases relating to these mail-messenger contracts the court has always been guided by a general principle. The contract has been considered, like all contracts, as having a definite subject-matter, known to both parties, concerning which they were contracting, but subject to two future unknown fluctuations, in the volume of the business and the amount of the service to be rendered. * * * Accordingly, it has also been held that the Department might multiply the number of branch postoffices and stations, but could not bring into the contract a new subject-matter and compel the contractor to render without compensation a service which he had not contracted to perform.

Thus, where the contractor had agreed to carry the mails from the general postoffice in New York to the railroads in Jersey City, the court held that he could not be

required to carry them to the Jersey City postoffice; and where he had agreed to carry them between the general postoffice and the branch postoffices and stations in the city, that he could not be required to carry them to numerous newly devised substations of a different character scattered about the city in apothecaries and cigar shops. In a word, the subject-matter of the contract was held to be the administrative system of the postal service in the city as it existed when the contract was made, with such additions or abbreviations as might be expressly set forth in the contract.

In the present case the bricks and mortar of the changed administrative system are the same—there are the same postoffice stations and railroads and steamboats—but out of identical materials an entirely new edifice has been built. In the details there has been no change, but in the aggregate of changes there has been an entire reconstruction of the system; and the new subject of contract brought thereby into the field of operation is far greater than in any case that has heretofore been brought before the court. The court is therefore of the opinion that for this service so rendered the claimant is entitled to recover what the service was reasonably worth. To hold otherwise would be to hold that this carefully prepared contract, with the elaborate specifications thereto annexed, might be reduced to three lines: The undersigned, in consideration of $————, covenants and agrees that during the next four years he will do whatever the Post Office Department bids him."

The Utah Stage Company had contracted to perform "without additional compensation, any and all new or additional service that may be ordered from July 1, 1893, or at any time thereafter during the contract term, whether between postoffices and railroad stations, between postoffices and steamboat landings, between postoffices and mail stations or between the several railroad stations, steamboat landings and mail stations now established or

that may hereafter be established, whether caused by the establishment of new or by change of site of existing postoffices, railroad stations, steamboat landings or mail stations within said cities or caused by the alteration of the routes made necessary by any other reason." During the contract term a new postoffice, not contemplated by the parties to this contract, had been built, uptown; and the decision of the courts was that the contract did not include the "vast amount of additional work" required in serving that office.

There was a sort of plausibility in the contention of Government counsel that the haul of mail to and from the new postoffice in New York was not generically different from the haul of the mails, containing precisely the same kinds of articles, to and from the old postoffice, down town. It would be utterly unreasonable to say that there is no generic difference between the mails of 1912 and the postal freight matter of later years.

In *Wolverton's case*, 34 Ct. Cls., 247, it was held that service of a postoffice "sub-station," a new institution since the claimant's contract was signed, was an essentially different thing from a "branch postoffice"or "mail station" named in the contract, and therefore, that the contractor was entitled to compensation for the former *quantum meruit*.

In *Weigel's case*, more recent, 47 Ct. Cls., 528, the contract was for mail messenger service by wagon in Chicago for a part of the mails only. Some of the mails had been carried by the street railroad companies or by letter carriers. During the term of Weigel's contract the Department dispensed with these latter services, and put the mails on Weigel's wagons. The court applied the principle declared in the Utah Stage Company's case and gave Weigel a judgment for this added service.

Other cases cited (p. 10, *sup.*) some relating to mail service but others relating to concerns and contracts of private individuals, illustrate how deeply courts will search to learn what was in the minds of contracting parties and how unsparingly they will discard words in those contracts which mean something else.

Freund v. United States, decided in this court on November 13, 1922, arose out of a contract for assembling the mails of the St. Louis postoffice. The service on which the bid was made was to be performed by seven circuits, each beginning and ending at a new postoffice; more or less mails being picked up throughout each circuit. The service which the contractors were actually compelled to perform—the new postoffice not being ready at the time expected—was made up of one-way trips to and from the postoffice, the wagons, in the main, coming away from the postoffice empty. A paragraph, added to the provisions of the advertisement, contained the following:

"It is hereby stipulated and agreed by said contractors and their sureties that the Postmaster General may change the schedule, vary, increase or decrease the trips on this route, or extend the trips to any new location of the postoffices, railroad stations, steamboat landings, mail stations, or points of exchange, with cable or electric cars named in the schedule for service for said route, in said advertisement, establish service to and from like offices, stations, landings, or points not named therein, and vary, increase, or decrease the trips thereto, and discontinue service between any of the postoffices, railroad stations, steamboat landings, mail stations, or points of exchange with electric or cable cars, or between any of them: Provided, That for any increase or decrease in the service authorized by the Second Assistant Postmaster General,

the pay of the contractor shall be increased or decreased, as the case may be, at the rate per mile of travel agreed to be paid for service under this contract, as shown by the annual rate of compensation and the annual miles of travel, based on the frequency and distances shown in the schedule of service for said route in said advertisement."

The decision of the Court of Claims was for the Government, and that was reversed by this court. The Chief Justice wrote the opinion of this court and said:

"There are two limitations in this very broad provision which deserve notice. One is that the offices, stations, landings and points, not named in the schedule, to and from which the Postmaster General was permitted to establish service, were to be like those named in the schedule, and the other is that the substituted service was to be such that the method of fixing pay in the original contract could be applied to it. Now it is clear to us that the substituted route did not establish a route to like stations and points. The findings give the two schedules and we reproduce them in the margin. An examination shows that the one was a light service of circuits from the postoffice and back again to take up collections from letter carriers. The other was the heavy work of transporting all the arriving and departing mail of the city from the railway stations to the old postoffice and back again. On the one, the contractors received pay for every mile traveled. On the other, the pay was made dependent on the carriage of mail and no empty trips of going or returning were included in the mileage paid for although the schedule made many of them necessary. It is impossible, therefore, save by forcing, to adapt the rate per mile of one route to the other. What has been said shows how different was the equipment needed, how variant the tonnage carried, what disparity between the hours of readiness required, and the differing methods of calculating compensation. This substituted route was undoubtedly necessary in the transportation of mails in the

city of St. Louis, but it was for a different purpose from that of the original route. The Department merely took advantage of general words in the appellants' contract to meet an emergency presented by the delay in finishing the new postoffice and the refusal of another contractor to continue this indispensable service beyond his term, to thrust this entirely new task upon the appellants here."

Additional Compensation Due After June 30, 1913, to Prevent Confiscation.

What has been said above regarding the interpretation of the present appellant's contract and the limits on the power of Congress, with special pertinence to the entirely uncompensated service prior to July 1, 1913, applies as well to service commencing on that date and running on some routes one year and on some routes two years therefrom, viz., to the end of the quadrennial contract periods; but there is a difference of detail.

In relation to the original parcel-post matter limited to eleven pounds, Congress in the Postal Appropriation Act of June 30, 1914 (37 Stat., Ch. 143, p. 791, Rec., p. 9), authorized the Postmaster General after June 30, 1913, to pay "not exceeding" 5 per cent for such increase of the gross weight of the mails as he should attribute to the parcel-post. By an order effective August 15, the Postmaster General raised this limit to twenty pounds, and again, by an order effective January 1, 1914, he made the limit fifty pounds. In the Postal Appropriation Act approved July 20, 1916 (39 Stat., Ch. 261, p. 412, Rec., p. 10), Congress authorized like increases of compensation, viz., of a maximum of one-half of one per cent in the first case, and a maximum of one per cent in the other case. To some of appellant's routes the Postmaster General allowed no increases whatever. To others, as against the 5 per cent authorized, he allowed increases ranging from

1.6 per cent to 4 per cent and as against the latter maxima authorized, yielding $14,824.14, there was allowed $552.51. The petition charges that when exacting the onerous services involved at the almost insignificant compensation allowed the Government confiscated appellant's property. Of course in this matter, as well as that of the initial six-months service, appellant's rights rest upon the Fifth Amendment to the Constitution.

The petition charges that the increases of compensation allowed to appellant were "far less than was necessary to compensate" it for the service described. At that stage, viz., the testing of the petition by demurrer, it was not important what proof might thereafter be made to support this allegation and whether the court might be convinced by the same. The court knew that it was not inherently impossible to make good such an allegation; that this thing has been done again and again, and in more complicated cases than this.

Vandalia Railroad Co. v. Schnull, 255 U. S. 113 (122).
Northern Pacific Ry. Co. v. North Dakota, 236 U. S. 585.
Norfolk & Western Ry. Co. v. West Virginia, 236 U. S. 605.
Lincoln Gas Co. v. Lincoln, 250 U. S. 257.
Detroit & Mackinac Ry. Co. v. Fletcher Paper Co., 248 U. S. 30.
Schneider Granite Co. v. Gast Realty Co., 235 U. S. 288.

At the Court of Claims there are no strict rules governing any part of the pleadings (*Clark v. United States*, 95 U. S. 539; *Heirs of Samuel Garland v. Choctaw Nation*, 256 U. S. 439; *Seaboard Air Line Ry's. case*, 53 Ct. Cls. 107). Obviously then it is true as to that court

(whatever different rules may apply by code in other jurisdictions), that a demurrer to a petition must be overruled if a valid cause of action is pleaded, whether the measure of damages be correctly or incorrectly stated.

With regard to the periods when appellant received some small compensation for the parcel-post service, the proof, conceivably, might fail on the question of confiscation and appellant could recover nothing. For the initial six months service, when no compensation was paid, appellant should recover on the basis of *quantum meruit* even though it should not make good its allegation that the 15 per cent pleaded was necessary to prevent confiscation.

BENJAMIN CARTER,
Attorney for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

THE ST. LOUIS SOUTHWESTERN RAILWAY Company, Appellant, *v.* THE UNITED STATES. } No. 184.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT.

Appellant had the usual arrangements with the Post Office Department for the carriage of the mail and was receiving the usual compensation as provided by the statutes.

Appellant alleges that its contracts were signed, as to the Fourth Division lines, in the months of February to June of 1910, and as to the Third Division routes, the weighing and contracting occurred during the same period in 1911, the agreements to be effective on July 1 of 1910 and 1911 (Tr. 4) for four years (Tr. 2).

The Act approved August 24, 1912, Section 8 (37 Stat. 539, 557), created the parcel post, which increased the weight of packages from four pounds to

eleven pounds and the size not greater than seventy-two inches in length and girth combined (Tr. 4, 5). By orders of the Postmaster General in the summer and autumn of 1912, the parcel post was inaugurated on January 1, 1913 (Tr. 6).

No provision for compensation to the mail-carrying railways for the parcel post service was made until the Act of Congress approved March 4, 1913 (37 Stat. 791, 797), making appropriations for the expenses of the Post Office Department for the fiscal year ending June 30, 1914, was passed, which authorized the Postmaster General "to add to the compensation paid for transportation on railroad routes on and after July first, nineteen hundred and thirteen, for the remainder of the contract terms, not exceeding five per centum thereof per annum * * * until otherwise provided by law" (Tr. 6).

The weight limit of eleven pounds continued in effect until August 15, 1913, when the Postmaster General raised the limit to twenty pounds; and on January 1, 1914, he raised it to fifty pounds for the first two zones (Tr. 6).

Appellant alleges (Tr. 6) that "under said new designations of weight, and in accordance generally, with said orders of the Postmaster General, the parcel-post matter was transported by petitioner to the ends of its said contract periods."

By Act approved July 28, 1916 (39 Stat. 412, 425; Tr. 7), it was provided that on account of the increased weight of mails resulting from the Postmaster General's Order No. 7720 of December 18, 1913, effective January 1, 1914, the Postmaster

General was authorized to add to the compensation for transportation on railroad routes on and after January 1, 1914, "for the remainder of the contract terms, *not exceeding* one per centum thereof per annum," and because of the increased weight resulting from Order No. 7349 of July 25, 1913, effective August 15, 1913, the Postmaster General was authorized to increase the compensation for transportation on railroad routes on and after August 15, 1913, "for the remainder of the contract terms, *not exceeding* one-half of one per centum thereof per annum" (Tr. 7).

In adjusting the compensation under the Act of March 4, 1913, which authorized added compensation on account of the parcel-post service, the Postmaster General made increases ranging all the way from 1.6 per cent to 5 per cent, according to routes; but as to certain routes no added compensation was allowed (Tr. 7).

Under the Act of July 28, 1916, authorizing increases of ½ of 1 per cent and 1 per cent above the compensation already allowed and paid, the Postmaster General "allowed to the greater part of said routes, * * * the full rates of increase named therein." As to some of the routes, he allowed no increase (Tr. 8).

Apparently, without complaint or protest of any kind, the appellant continued to carry the mails and to accept the compensation as prescribed by the statutes authorizing the Postmaster General to adjust compensation within certain limits on

account of the increased weight and dimensions of the packages resulting from the parcel post. The statutes are unambiguous and clear; nor is it alleged or argued that the Postmaster General acted beyond or exceeded his authority in any manner whatsoever.

It is alleged that in December, 1912, a Committee on Railway Mail Pay addressed certain letters to the Chairman of the House Committee on Post Offices and Post Roads and to the Chairman of the so-called "Bourne Commission," pointing out that no satisfactory determination of the compensation due for the parcel post service could be reached before the service should be established, and suggestions were made with respect to provisions which should be contained in the statutes, which were not accepted (Tr. 9, 10).

Subsequently, in August, 1913, after the Postmaster General had announced the increases to be paid to the railroad companies with respect to the parcel-post matter limited to eleven pounds, the Committee on Railway Mail Pay submitted to the Postmaster General a protest in writing "against both (1) the denial of all compensation to the railroad companies for the parcel post service previous to July first just past and (2) the amounts proposed to be paid for the service commencing on that day" (Tr. 10). It is further alleged that "in other ways, during said contract terms, petitioner made protests to the Post Office Department on both of said points" (Tr. 10).

Of course it can not seriously be maintained that general representations made by a Committee on Railway Mail Pay to a committee of the House of Representatives or to the Postmaster General are in any sense a protest. Moreover, the Court will not consider undefined protests made "in other ways."

Without any statute whatsoever authorizing it, and without any power or authority whatsoever on the part of the Postmaster General to pay it, the appellant now claims that it is entitled to 15 per cent per annum with respect to the packages of eleven pounds weight and less; and for the entire portions remaining after August 15, 1913, of the contract periods, 6 per cent of the compensation for the transportation. Its claims are itemized by routes and dates (Tr. 8, 9).

On demurrer, the Court of Claims dismissed the petition (Tr. 13), and the appellant appealed.

II.

ARGUMENT.

Appellant maintains that its rights rest upon the Fifth Amendment (Br. 23), in that it did not contract to perform the parcel post service (Br. 14), and in performing that service for six months without any additional compensation and thereafter at an "almost insignificant compensation," the Government confiscated its property (Br. 16, 23).

That the real basis of appellant's claim rests on the initial six months of the service appears from the brief, wherein it is said (Br. 24):

> With regard to the periods when appellant received some small compensation for the par-

> cel-post service, the proof, conceivably, might fail on the question of confiscation and appellant could recover nothing. For the initial six months' service, when no compensation was paid, appellant should recover on the basis of *quantum meruit*, even though it should not make good its allegation that the 15 per cent pleaded was necessary to prevent confiscation.

This would seem to be a concession that the appellant is not claiming under any Act of Congress or any express contract authorizing the additional compensation; but it claims solely upon an implied contract alleged to arise under the Fifth Amendment from a supposed confiscation of its property or services for Governmental purposes.

The appellant's position is substantially the same as that of the carrier in *N. Y., N. H. & H. R. R.* v. *United States*, 251 U. S. 123, 126, wherein "appellant claims its property was taken for public use and adequate compensation must be paid." The Court, speaking through Mr. Justice McReynolds, said, however (p. 127), that prior to the Act of July 28, 1916, c. 261, 39 Stat. 412, 429, with the exception of certain roads aided by land grants, "railroads were not required by law to carry the mails," and that "as appellant voluntarily accepted and performed the service with knowledge of what the United States intended to pay, it can not now claim an implied contract for a greater sum."

In *N. Y., N. H. & H. R. R.* v. *United States*, 258 U. S. 32, 34, this Court, speaking through Mr. Justice Holmes, again said:

> The service here, rightly or wrongly, was demanded as mail service, was rendered as mail service and was paid for without protest as mail service. Whether the Treasury technically complied with all the requirements of the statute concerning postal service did not matter to the claimant. By giving its claim a different name from that passed upon in *New York, New Haven & Hartford R. R. Co.* v. *United States*, 251 U. S. 123, 127, the claimant does not better its case.

Appellant alleges that the Postmaster General, in making effective the Act of March 4, 1913, did not ascertain the weights of the parcel-post matter in relation to the railway routes, but that he merely, through examination and reports made by his subordinates, estimated, in proportion to the mails carried just before January 1, 1913, the weight of the parcel-post matter carried on the said routes (Tr. 7).

In *Delaware, L. & W. R. R. Co.* v. *United States*, 249 U. S. 385, 388, in rejecting that contention, this Court said:

> The references to average weights are not enough to require reweighing. They are an enumeration of the elements identifying and determining the present rates that are to be reduced. We see no reason to suppose that Congress intended to require a special and

> expensive investigation at the cost of the Government rather than to adopt the existing practice and to order the reduction without reference to the exact time when the last thirty days' weighing occurred or should occur.

Counsel argues that if the appellant is not entitled to the 15 per cent claimed, it is entitled, at least, to the 5 per cent provided in the Act of March 4, 1913, 37 Stat. 791, 797. (Br. 13.)

In *United States* v. *Atchison, T. & S. F. Ry. Co.*, 249 U. S. 451, 453, 454, this Court, in rejecting that argument, and speaking through Mr. Justice McReynolds, said:

> Acting under this provision, the Postmaster General refused to allow increased compensation of five per centum upon all routes, but apportioned payments among them—never in excess of five per centum—according to a carefully worked out formula which he deemed appropriate. Appellee sued for the difference between amount actually received and what it would have received if five per centum had been added. Considering history of the legislation and intent of Congress supposed to be indicated thereby, the Court of Claims held that the act "required the Postmaster General to add 5 per cent to the compensation being paid on all of said routes, and he having failed to do so that the plaintiff is entitled to recover the difference sued for." (52 Ct. Clms. 338, 361.)
>
> We are unable to agree with this conclusion. The language of the enactment is clear and

we think it vested in the Postmaster General a discretion which, so far as shown by the record, has not been abused. We are not unmindful of the burden imposed upon appellee nor of the circumstances which lend color to a different conclusion; but these are not sufficient to justify a disregard of the plain import of the words which Congress deliberately adopted.

In the *Mail Divisor Cases*, 251 U. S. 326, 339, Mr. Justice Pitney, with whom concurred Mr. Justice McKenna, in an opinion concurring in the affirmance of the judgment, but upon somewhat different grounds than those expressed in the opinion of Mr. Justice Holmes, said:

> From the findings of the Court of Claims it appears that in all of these cases there were express contracts; and I concur in the view of that court (53 Ct. Cls. 258, 308, 315, 318, 319) that the contracts arose not out of the Distance Circular, in which the Postmaster General specially called notice to Order No. 412, and to which some of the claimants responded with protests, more or less explicit, that they would not be bound by that order; but arose out of what subsequently happened. The Postmaster General in every case informed the protesting carriers that he would not enter into contract with any railroad company excepting it from the operation of any postal law or regulation. The mails were weighed and the average weight ascertained in accordance with Order No. 412, as all the claimants

had been notified would be done; thereafter the Postmaster General, upon the basis of the weight thus ascertained, caused the maximum statutory rate to be calculated, issued orders naming certain amounts thus arrived at as the compensation for the service, and gave notice in proper form to the carriers specifying in terms the readjusted pay that would be allowed, "subject to future orders and to fines and deductions." Thereafter the carriers received and transported the mails as offered, periodically accepted compensation in accordance with the readjustment notices, and proceeded thus without further objection or protest until the end of the respective quadrennial periods. In short, although in some cases they declared they would not consent to the ascertainment of average weights on the basis of Order No. 412, they did not insist upon their objection in the face of the Postmaster General's declaration that he would not accede to it. * * *

I deem it clear, therefore, that the claimants in fact accepted the Postmaster General's offers as contained in the readjustment notices, by proceeding to perform the prescribed service in accordance therewith and accepting the compensation due to them therefor. And so the Court of Claims held (53 Ct. Cls. 258, 308, 313, 315, 318, 319.)

Counsel rely on *Freund* v. *United States*, Nos. 29 and 37, October Term, 1922, decided November 13, 1922 (Br. 20). In that case, this Court, speaking by Mr. Chief Justice Taft, said that the Court "have no

difficulty, therefore, in distinguishing this case from the so-called *Railroad Mail Cases.*"

In sustaining the demurrer and dismissing the appellant's petition, the Court of Claims, citing cases hereinbefore referred to, said (Tr. 13):

> The claim of the plaintiff is not founded upon a contract, express or implied, nor has any act of Congress authorized the payment of the additional amount demanded by the plaintiff.
>
> Congress authorized an increase in the compensation of the carriers not exceeding five per centum on account of parcel post, and this negatives the idea that Congress meant or understood that an implied contract was created by the parcel post act.
>
> It appears from the allegations of the petition that plaintiff voluntarily accepted and performed the service with knowledge of what it would receive, and it can not now claim an implied contract for a greater sum.

III.

CONCLUSION.

The appeal presents no question not already passed upon and disposed of by this Court in the previous cases. The judgment of the Court of Claims dismissing the petition should be affirmed.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
W. MARVIN SMITH,
Assistant Attorney.

FEBRUARY, 1923.

○

Judgment reversed.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 184. Argued March 6, 7, 1923.—Decided April 23, 1923.

1. Under the Act of March 4, 1913, c. 143, 37 Stat. 797, authorizing the Postmaster General to pay additional compensation, not exceeding five per cent., for transportation of mail on railroads on and after July 1, 1913, for the remainder of the contract terms,

on account of increased weight of mails resulting from the parcels post law, the decision of the Postmaster General upon the amount of compensation to be allowed within the limit fixed was conclusive; and a railroad company, which accepted payment, under protest, of amounts so fixed, cannot claim more from the Government upon the ground that they were inadequate. P. 73.

2. Transportation of additional mail matter, resulting from the parcel post, even if not requirable under contracts existing when the parcel post system was adopted, did not give the transporting company a right to additional compensation, when it was done voluntarily during a period (January 1, 1913, to June 30, 1913) for which Congress has failed to allow such compensation. Act of March 4, 1913, *supra*. P. 73.

56 Ct. Clms. 64, affirmed.

APPEAL from a judgment of the Court of Claims dismissing the petition upon demurrer.

Mr. Benjamin Carter for appellant.

Mr. Blackburn Esterline, Assistant to the Solicitor General, with whom *Mr. W. Marvin Smith* was on the brief, for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Prior to July 1, 1910, claimant entered into a contract with the Post Office Department to carry the mails over a part of its line for the period of four years from that date. Prior to July 1, 1911, it entered into a like contract to carry the mails over another part of its lines. These contracts were in form and substance similar to that involved in *New York, New Haven & Hartford R. R. Co.* v. *United States*, 258 U. S. 32, and other recent cases.[1] By them the amount of compensation was fixed by a weighing prior to the date of the contract. While the mails

[1] *United States* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 249 U. S. 451; *New York, New Haven & Hartford R. R. Co.* v. *United States*, 251 U. S. 123; *The Mail Divisor Cases*, 251 U. S. 326.

were being carried by claimant under these contracts, the parcel post system was established pursuant to the Act of August 24, 1912, c. 389, § 8, 37 Stat. 539, 557–559. From the inauguration of the service, on January 1, 1913, to the end of the contract periods, claimant carried the parcel post together with the other mail. For rendering this service, during the first six months, no additional compensation has been paid claimant. For rendering it during the remainder of the contract periods, claimant received, under later legislation, sums in addition to the compensation provided by the contracts. These sums it deems inadequate. On February 1, 1919, this suit was brought to recover, as reasonable compensation for the service rendered, the several amounts which it insists should have been paid. The Government demurred to the petition. The Court of Claims dismissed it on the ground that there was neither a contract express or implied in fact, nor a law of Congress to support the claims for additional compensation. The case is here on appeal.

The Act of August 24, 1912, provided that the establishment of parcel post zones and postage rates should go into effect January 1, 1913. It increased the weight of fourth class mail matter from four to eleven pounds and the size to seventy-two inches in length and girth. It also authorized further increases of the weight limit, by order of the Postmaster General with the consent of the Interstate Commerce Commission. But that act, while it authorized the Postmaster General to "readjust the compensation of star route and screen wagon contractors if it should appear that as a result of the parcel post system the weight of the mails handled by them has been materially increased," made no provision whatsoever for increasing the pay of railroads because of carrying parcel post matter. Act of March 4, 1913, c. 143, 37 Stat. 791, 797, authorized the Postmaster General "to add to the compensation paid for transportation on railroad routes

on and after July 1, 1913, for the remainder of the contract terms" not exceeding five per cent. thereof per annum "on account of the increased weight of mails resulting from the enactment of" the parcel post provision of the preceding year. The Postmaster General allowed claimant, under this act on some routes the full five per cent.; on some less; on some nothing additional. But the latter act, also, contained no provision authorizing additional pay to the railroads for carrying parcel post matter from January 1, 1913, to June 30, 1913.

First. That no recovery can be had for the period after June 30, 1913, is clear. Before that date Congress had made express provision for the additional compensation and in so doing had limited the amount payable. The power to grant or to withhold was, within the limit set, vested in the Postmaster General; and his decision as to additional compensation was conclusive except upon Congress.[2] The protest alleged to have been made in August, 1913, against the amounts proposed to be paid for this period, cannot avail claimant, *New York, New Haven & Hartford R. R. Co.* v. *United States,* 251 U. S. 123.

Second. The first six months' period presents a different situation; but the legal result is the same. There is no claim of an express contract to pay additional compensation; nor is there any basis for a claim on a contract implied in fact. The petitioner alleges that the parcel post matter was radically different in character

[2] Some further compensation was in fact made after the expiration of the contracts, under later legislation. By Act of July 28, 1916, c. 261, 39 Stat. 412, 425 (passed after both contracts with claimant had expired), the Postmaster General was authorized to make an additional payment not exceeding one-half of one percentum per annum on account of the increased weight of mails resulting from his order effective August 15, 1913, raising the weight limit to twenty pounds and additional payment not exceeding one per cent. on account of the increased weight resulting from his order effective January 1, 1914, raising the weight limit to fifty pounds.

from the ordinary mails as constituted before January 1, 1913. It may be, that claimant might legally have refused, for this reason, to carry the parcel post mail under then existing contracts; even if additional compensation had been offered. Compare *United States* v. *Utah, Nevada & California Stage Co.*, 199 U. S. 414; *Hunt* v. *United States*, 257 U. S. 125. But the petition contains no allegation that it refused to perform this extra service, unless the Government would agree to pay additional compensation. The petition contains allegations apparently designed to show that objection to carrying the parcel post matter would have been largely futile; [3] but the allegations fall far short of showing a demand that the parcel post matter be eliminated, or a protest against carrying it under the conditions then existing. If the parcel post act, or other legislation, gives a right to compensation, the refusal or failure of the Postmaster General to allow the claim could not, of course, defeat recovery. Compare *Campbell* v. *United States*, 107 U. S. 407, 411;

[3] The petition alleges: "Much the larger part of the mails on petitioner's routes and on the routes of the other important railroad companies were carried in post office cars, for which cars arrangements were made between the Post Office Department and the railroad companies independent of the contracts for mail transportation, and, under such arrangements, such cars were in operation on petitioner's said routes at the time when the parcel post was established and at the times when the increases in weight of the parcel-post matter became effective. The greater part of the mails carried in such cars were loaded into and out of the same by contractors or other persons employed by the Post Office Department, over whom petitioner and the other railroad companies had no control, and the Postal Laws and Regulations (sec. 1583) forbade that railroad employees should enter the post office cars when in motion for any other purpose than the operation of the trains. Moreover, the parcel-post matter was so confused with the other mails that the employees of petitioner and the other railroad companies could not possibly have distinguished them, and removed them from the post office cars, if otherwise they had had opportunity."

United States v. *Knox*, 128 U. S. 230. But, unless there is such legislation, claimant cannot recover without showing a contract, express or implied in fact to pay the extra compensation. Compare *United States* v. *North American Transportation & Trading Co.*, 253 U. S. 330, 335; *Sutton* v. *United States*, 256 U. S. 575, 581. No basis for such a contract is afforded by the further allegation that when the Act of 1912 was passed, and when the parcel post system was established, railroads, high officials of the Post Office Department, and members of both houses of Congress, in charge of postal legislation, understood that Congress would provide additional compensation to the railroads.

The legislation makes no provision for additional compensation to the railroads for the period prior to July 1, 1913; and its history makes clear that Congress concluded not to allow any. For some time prior to the passage of the Act of August 24, 1912, there had been much discussion in Congress concerning the pay of railroads for carrying the mail. The carriers urged generally that the pay was inadequate; and there were proposals for increase of compensation. On the part of the public, there was a widespread belief that the railroads were overpaid; and there were proposals to reduce the compensation. When Congress passed the 1912 Act, it was not prepared to decide this controverted question. It, therefore, appointed a special committee to enquire into the subject, and also others, relating to parcel post, and directed the committee to report at the earliest date possible. Meanwhile, the discussion continued in Congress. That the parcel post would result in largely increased weight of mail was repeatedly asserted; but it was insisted that the pay under existing contracts would give the railroads even more compensation than they deserved. The fact was recognized that the appropriation bill enacted March 4, 1913, provided increased pay only for parcel post service ren-

dered after June 30, 1913.[4] The failure of Congress to make any provision for the preceding six months was not inadvertent. It was the deliberate purpose of Congress not to give the railroads additional pay for carrying the parcel post mail during that period.[5]

The case at bar is wholly unlike *Freund* v. *United States*, 260 U. S. 60; *United States* v. *Utah, Nevada & California Stage Co.*, 199 U. S. 414, and *Hunt* v. *United States*, 257 U. S. 125, on which claimant relies. In each of those cases there was ample power in the Postmaster General to pay the additional compensation claimed. In each the main question presented was whether under the proper construction of the contract claimant was entitled to additional pay. Moreover, in each, the contractor had by proper protest preserved his rights; and there was perhaps an element of duress. Here, as in *Sutton* v. *United States*, 256 U. S. 575, the Department had been denied power to pay an additional sum; there

[4] See Vol. 49, Cong. Rec., Part 5, 62nd Cong., 3rd sess., pp. 4459, 4461, 4684, 4686–4689, 4690, 4692, 4767, 4769, and particularly p. 4768:

"Mr. Moon of Tennessee (Manager on part of the House, submitting Conference Report). No; we do not add anything until after July, 1913.

"Mr. Murdock. That is my question—do we add 5 per cent after July, 1913?

"Mr. Moon. Yes; weighed before January 1."

[5] See Senate Report, Committee on Post Offices and Post Roads, July 23, 1912, No. 955, p. 25, 62nd Cong., 2nd sess.; Conference Report, August 23, 1912, H. R. No. 1242, 62nd Cong., 2nd sess.; Message of President, December 19, 1912, Sen. Doc. 989, p. 6, 62nd Cong., 3rd sess.; Senate Report, February 11 (17), 1913, No. 1212, pp. 2, 4, 62nd Cong., 3rd sess.; also Vol. 49, Cong. Rec., Part 2, 62nd Cong., 3rd sess., pp. 1409, 1411, 1412, 1466, 1476, 1506, 1509, 1511; Vol. 49, Cong. Rec., Part 4, 62nd Cong., 3rd sess., pp. 4012, 4013, 4014; Vol. 48, Cong. Rec., 62nd Cong., 2nd sess., Part 5, pp. 4675, 4989, 5068, 5075, 5227; Vol. 48, Cong. Rec., 62nd Cong., 2nd sess., Part 6, pp. 5439, 5473, 5504, 5649.

was no protest by the contractor against assuming the additional service; and there was no duress. The service was undertaken voluntarily; no doubt, in the expectation that Congress would provide additional compensation. It made some provision; but concluded not to make any for the first six months. We may not enquire into the reasons for this refusal, or undertake to revise its judgment. The obstacle to recovery is not strictly lack of jurisdiction in the Court of Claims. There was an express contract between the parties; there was also legislation; and on these the claim is founded. The obstacle to recovery is lack of legal merits. The Government did not in fact promise to pay for the extra service; nor did the legislation give to claimant a right to compensation. In other words, the petition fails to set out a cause of action.

Affirmed.